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No. 85-659

In the Supreme Court of the United States

OCTOBER TERM, 1985

ALWIN E. HOPFMANN, PETITIONER,

v.

FEDERAL ELECTION COMMISSION, RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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NOVEMBER 15, 1985

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QUESTIONS PRESENTED

1. Whether the Commission acted contrary to law when it dismissed petitioner's administrative complaint on the ground that a state party convention preceding a mandatory primary election was not itself an "election" within the meaning of the Federal Election Campaign Act.

2. Whether the courts below properly dismissed as frivolous the numerous constitutional claims petitioner sought to have certified to the *en banc* court of appeals pursuant to 2 U.S.C. § 437h.*

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* Petitioner has erroneously named Senator Edward Kennedy and the Committee to Reelect Senator Kennedy as respondents in his petition. Although he named these private parties as defendants along with the Commission in his original complaint in the district court, he later acceded to the Commission's position that they were not proper defendants and deleted them as parties when he filed his amended complaint.

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OPINIONS BELOW

The opinion of the court of appeals, affirming the district court, is unpublished and appears in the appendix to the petition ("Pet. App.") at C-1. The memorandum opinion and order of the district court, affirming the Commission's dismissal of Mr. Hopfmann's administrative complaint and rejecting his constitutional claims as frivolous, are unpublished and are set forth in full in the Appendix to this brief, *see* n.4, *infra*. The Commission's General Counsel's Report explaining why Hopfmann's admin-

istrative complaint should be dismissed is set forth at Pet. App. A-1.[1]

JURISDICTION

The judgment of the court of appeals was entered on May 13, 1985. On July 19, 1985 the court denied Mr. Hopfmann's petition for rehearing and suggestion for rehearing *en banc*. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The relevant statutory provisions are set forth at Pet. App. Stat-4-5, 7-8, 17.

COUNTERSTATEMENT OF THE CASE

This case arises from the Federal Election Commission's dismissal of an administrative complaint filed by Mr. Hopfmann against Senator Edward Kennedy. Hopfmann sought review of this dismissal in district court, and also asserted a large number of constitutional claims. The district court affirmed the Commission's dismissal of the administrative complaint and dismissed the constitutional claims as frivolous. The court of appeals affirmed and awarded attorneys' fees and costs to the Commission, finding the appeal frivolous.

A. The Commission Proceedings

In September, 1982, Hopfmann filed with the Commission an administrative complaint pursuant to 2 U.S.C. § 437g, alleging that Senator Edward Kennedy's campaign committee had violated certain

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[1] The Court has held that the General Counsel's Report provides the appropriate basis for reviewing a Commission decision. *FEC* v. *Democratic Senatorial Campaign Committee*, 454 U.S. 27, 38 n.19 (1981).

statutory provisions, principally reporting obligations.[2] The complaint was grounded upon the contention that the Democratic state convention which preceded the 1982 Massachusetts primary election was itself an "election" under 2 U.S.C. § 431(1)(B).[3]

The Federal Election Campaign Act of 1971, as amended, *codified at* 2 U.S.C. §§ 431-455 ("the Act") includes within the definition of election only those party conventions vested with "authority to nominate a candidate." 2 U.S.C. § 431(1)(B). Massachusetts law and state party rules provide that candidates are "endorsed" by votes at the state party convention, but that the state primary election determines the party's nominee. Any candidates receiving at least 15% of convention support may appear on the primary ballot to compete with the endorsed candidate, and anyone can conduct a write-in cam-

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[2] "Any person" who believes a violation of the Act has occurred may file a written, sworn complaint with the Commission. 2 U.S.C. § 437g(a)(1). Within five days, the Commission must notify the person(s) alleged to have committed the violation, who are provided 15 days to demonstrate in writing that no action should be taken on the complaint. *Id.* Thereafter, upon consideration of the complaint and any response filed, the Commission may determine it has "reason to believe" a violation has occurred and conduct an investigation, or may find "no reason to believe," close the file, and notify the complainant of its action. 2 U.S.C. § 437g(a)(2); *see* 11 C.F.R. § 111.9(b) (1985).

[3] If the convention had been an "election" under the Act, the Kennedy committee would have violated the Act's requirement that campaign committees file a report of receipts and disbursements at least 12 days before each election. 2 U.S.C. § 434(a)(2)(A)(i); 11 C.F.R. § 104.5(a)(1)(i).

paign.[4] On these facts, the Commission concluded that because the convention was not authorized by law or party rule to finally nominate a candidate, it was not an election under the Act (Pet. App. A). Finding, therefore, that there was no reason to believe Senator Kennedy's committee had violated the Act, the Commission dismissed the complaint.

B. The District Court Proceedings

Mr. Hopfmann sued in the district court under 2 U.S.C. § 437g(a)(8) to overturn the Commission's decision, and later amended his complaint to include a variety of constitutional claims which he asked the district court to certify to the court of appeals sitting *en banc*, pursuant to 2 U.S.C. § 437h.

On March 8, 1984, the district court issued its memorandum opinion and order (App. 1a-10a).[5] Observing that the primary issue was whether the Commission's interpretation of the Act was "sufficiently reasonable" (App. 5a, *quoting FEC v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 39 (1981)), the court found that "plaintiff's contentions were considered, and that the FEC's decision is consistent with its previous decisions," and that "the decision of the FEC dismissing plaintiff's complaint was reasonable. . . ." (App. 6a). The dis-

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[4] Complainant Hopfmann had participated in the 1982 Massachusetts Democratic convention, but Senator Edward Kennedy won the majority of support. Because Mr. Hopfmann received less than 15% support there, he was not placed on the ensuing primary ballot. He did not attempt a write-in campaign.

[5] The reproduction of the district court's opinion in petitioner's appendix omits a portion of the text. Accordingly, "App. ——" refers to the appendix at the back of this brief, containing a full reproduction of the district court's opinion and order.

trict court therefore granted the Commission's motion for summary judgment (App. 10a).

The court then reviewed Hopfmann's constitutional claims and concluded that "plaintiff's challenges do not raise substantial constitutional questions, are frivolous and are not based on any coherent legal theory" (App. 7a). Accordingly, the court refused to certify Hopfmann's questions to the court of appeals *en banc*, and instead granted the Commission's motion to dismiss these claims (App. 10a).

C. The Court of Appeals Decision

On May 13, 1985, the court of appeals affirmed the district court's decision (Pet. App. C-2). Initially, the court observed that dismissal of the appeal "would be appropriate under Fed. R. App. P. 3(a)" because of Mr. Hopfmann's repeated unjustified failure to comply with court orders (Pet. App. C-8-9). However, since briefing had been completed and the court had considered the merits of the case, the court instead went on to hold "that the appeal is in any event utterly without merit" and affirmed the district court (Pet. App. C-9).

The court first concluded that the Commission was warranted in dismissing Hopfmann's administrative complaint, finding that the Commission had consistently determined conventions which only narrowed the field of candidates on the primary ballot not to be "elections" under the Act and that neither the statute nor the legislative history contradicted this construction (Pet. App. C-5-6). Second, the court noted that "it is not within the FEC's province to determine whether Massachusetts' primary system satisfies the federal Constitution," and affirmed the district court's dismissal of Hopfmann's numerous constitutional

claims (Pet. App. C-6). Finally, concluding that Hopfmann's statutory claims were unsupported and the constitutional claims patently without merit, the court awarded the Commission attorneys' fees and costs for a frivolous appeal, pursuant to Fed. R. App. P. 38 and 28 U.S.C. § 1912 (Pet. App. C-10).

On July 19, 1985, the court denied Mr. Hopfmann's petition for rehearing (App. 11a), and on August 8, 1985, it awarded the Commission costs and attorneys' fees in the amount of $3578.90 (Pet. App. K-1), which Mr. Hopfmann has so far failed to pay.

REASONS WHY THE WRIT SHOULD BE DENIED

Petitioner has failed to show that any of his numerous Questions Presented warrants this Court's review. Sup. Ct. R. 17.1.[6] The decision below determined only that the Commission did not abuse its discretion in dismissing an administrative complaint, and that the district court properly followed this Court's settled construction of 2 U.S.C. § 437h when it dismissed a number of purported constitutional questions found to be frivolous on their face. Petitioner has alleged no conflict among the circuits, and the decision of the court below clearly comports with this Court's prior decisions under the Act. Accordingly, the petition should be denied.

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[6] Mr. Hopfmann's Questions Presented fill eighteen pages at the front of his petition and the remainder of the petition is similarly rambling, redundant, and in parts unintelligible. It would appear that the petition thus violates Rule 21.5 of the Rules of this Court, and should be rejected for this reason alone. *Cf. Huffman* v. *Pursue,* 419 U.S. 892 (1974).

I. THE COMMISSION'S DISMISSAL OF HOPFMANN'S ADMINISTRATIVE COMPLAINT WAS NOT CONTRARY TO LAW.

As this Court has recognized, the standard the courts utilize in reviewing the Commission's dismissal of an administrative complaint under 2 U.S.C. § 437g (a)(8)(C) is a narrow one: whether the Commission's action was arbitrary, capricious, an abuse of discretion or otherwise contrary to law. *FEC v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 31, 37 (1981). When reviewing the Commission's interpretation of the Act, the courts must afford substantial deference to the Commission's view:

> [T]he task for the Court of Appeals was not to interpret the statute as it thought best but rather the narrower inquiry into whether the Commission's construction was "sufficiently reasonable" to be accepted by a reviewing court. [Citations omitted]. To satisfy this standard it is not necessary for a court to find that the agency's construction was the only reasonable one or even the reading the court would have reached if the question initially had arisen in a judicial proceeding.

FEC v. Democratic Senatorial Campaign Committee, 454 U.S. at 39. As we show below, the lower courts properly applied this standard of review in affirming the Commission's dismissal of Mr. Hopfmann's administrative complaint.

The Act contains, *inter alia*, reporting requirements and contribution limitations for each separate election. 2 U.S.C. §§ 434(a)(2)(A), 441a(a)(1), (6). The Act defines election to include: (1) "a general, special, primary or runoff election;" and (2) "a convention or caucus of a political party which has author-

ity to nominate a candidate." 2 U.S.C. § 431(1)(A), (B).[7] Thus, the determinative question in this case was whether the 1982 Massachusetts Democratic Pre-Primary Convention had the "authority to nominate a candidate."

The Commission has consistently construed the Act's definition of election to apply only if a convention has the legal authority to actually award the party's nomination to a candidate, without the necessity of running in a subsequent primary campaign. *See* Advisory Opinions ("AO") 1980-60, 1978-30, 1976-58, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶¶ 5499, 5325, 5211.[8] In states where the candidate endorsed by the convention must still run in a primary election before actually being awarded the party's nomination, the Commission has always found a party convention not to be an "election" under the

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[7] Commission regulations provide that a party convention is an election only if it "has the authority to select a nominee for federal office on behalf of that party." 11 C.F.R. § 100.2(e).

[8] Any person may submit a request concerning application of the Act or of Commission rules to "a specific transaction or activity by the person," and the Commission must render a written advisory opinion within 60 days upon which the requestor and other similarly situated persons may rely. 2 U.S.C. § 437f(a), (c).

Contrary to petitioner's characterization (Pet. 46), the Commission found the Connecticut pre-primary convention at issue in AO 1976-58 to be an election not because in a particular instance only one candidate might qualify for the primary ballot under Connecticut's 20% threshold requirement, but because the statute expressly provided that in such situations "no primary shall be held . . . for such office and the [convention-endorsed] candidate for such office shall be deemed to have been lawfully chosen as the [party's nominee] for such office." 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5211 at p. 10,153, *citing* Conn. Gen. Stat. 9-416 (1976).

Act. *See* AO's 1984-16, 1981-29, 1978-25, 1 Fed. Elec. Camp. Fin. Guide (CCH), ¶¶ 5758, 5616, 5320.

Massachusetts requires party candidates for statewide and federal office to be nominated by a plurality of the vote in the primary election. Mass. Gen. Laws ch. 53, §§ 2, 41 (1980) (Pet. App. Stat-4, 5). There is no provision in Massachusetts law recognizing any circumstances in which a candidate can obtain a party's nomination without winning a primary election, no matter what the vote of the party convention. The Massachusetts Democratic Party Charter also does not authorize the party convention to nominate a candidate. Rather, the Charter authorizes the convention to "endorse" candidates by majority vote, and provides that any candidates not endorsed but having received at least 15% of convention support may appear on the ballot with the "endorsed" candidate in the subsequent primary election. Article Six, Section III, *Charter of the Democratic Party of the Commonwealth of Massachusetts* (Pet. App. Stat-7-8). Although the State of Massachusetts has enforced the party's 15% rule as an additional condition to appearance on the primary ballot, it continues to require in all cases that a candidate run in and win a primary election before being recognized as the party's nominee in the general election.[9]

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[9] The 15% rule was enforced by Massachusetts state officials during the 1982 election cycle after the Massachusetts Supreme Judicial Court rendered an advisory opinion concluding that this was required. *Opinion of the Justices,* 434 N.E.2d 960 (1982). That court later confirmed this conclusion in a lawsuit brought by a candidate for the nomination for Lieutenant Governor who had been omitted from the primary ballot because he received less than 15% of convention support. *Langone* v. *Secretary of Commonwealth,* 446 N.E.2d 43 (Mass.), *appeal dismissed, cert. denied,* 103 S. Ct. 1510 (1983).

In sum, Massachusetts statute and party rules in no case authorize the convention actually to select the party's candidate and dispense with the primary election. Thus, the Commission properly applied its consistent construction of the Act when it concluded that the Massachusetts Democratic convention did not have "authority to nominate a candidate", 2 U.S.C. § 431(1)(B), and was therefore not an "election" under the Act (Pet. App. A-11-12). *See also* AO 1984-16, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5758 (1984 Massachusetts Democratic Convention not "election").[10]

Petitioner Hopfmann points to nothing in the legislative history indicating a congressional intent contrary to the Commission's interpretation of section 431(1)(B). Nor does he appear to disagree with the Commission's conclusions as to how Massachusetts actually applied the rules governing the state party convention and the primary election. Rather, he argues (Pet. 10-16, 33-46) that the 15% party rule which resulted in his omission from the 1982 primary election ballot is invalid for a variety of legal and constitutional reasons, and should have been pronounced so by the Commission. As the court of appeals concluded, however (Pet. App. C-6), the Commission's

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[10] To the extent that petitioner argues that the pre-primary convention in *his* case must have been an election because it turned out that Senator Kennedy was unopposed in the primary, he is wrong. The Commission's regulations expressly provide that "[a]n election in which a candidate is unopposed is a separate election." 11 C.F.R. § 110.1(j)(2). Any ballot access rules can *sometimes* result in only one name appearing on the ballot and the Massachusetts system is no different; while Senator Kennedy was the only name on the ballot for the U.S. Senate nomination, five candidates were on the 1982 Democratic primary ballot for Lieutenant Governor. *Langone* v. *Secretary of Commonwealth*, 446 N.E.2d at 45, 48.

function is only to determine the convention's authority under the Massachusetts rules actually employed at the time, and to decide whether those rules made the convention an "election" within the Act; it is not up to the Commission to decide whether Massachusetts' system is constitutional. Thus, none of his contentions regarding the validity of the party rule or his omission from the ballot is germane to this case.[11] Indeed, petitioner is well aware of the proper forum for these claims, for the First Circuit recently resolved his appeal directly challenging Massachusetts' enforcement of the 15% rule, and he can properly bring those issues before this Court by seeking review of *that* court's decision. *Hopfmann* v. *Connolly*, 769 F.2d 24 (1st Cir. July 31, 1985) (*reh'g denied*, September 23, 1985), *on remand from* 105 S. Ct. 2106. Those contentions, however, provide no grounds for disturbing the Commission's decision here.[12]

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[11] Contrary to petitioner's assertions (Pet. 42-45), the Commission did not purport to consider or decide whether the availability of write-in campaigns could cure any otherwise unconstitutional restrictions on ballot access. It noted the statutory recognition of write-in campaigns, Mass. Gen. Laws ch. 53, §§ 3, 35A, 52 (1980), only as additional evidence that the Massachusetts primary election remains the final step in the nominating process, even in the case where only one candidate qualifies for the ballot.

[12] Of course, the Commission concluded that the convention was not an election even with the application of the party's 15% rule. If the 15% rule had been disregarded, as Mr. Hopfmann argues it should, the convention would *a fortiori* not be an "election" under the Act, for this would widen access to the primary ballot to candidates who meet the state's other requirements.

II. PETITIONER'S CONSTITUTIONAL CLAIMS WERE PROPERLY DISMISSED AS FRIVOLOUS.

Section 437h of Title 2, United States Code, is an extraordinary jurisdictional statute which permits any individual voters to bring a declaratory judgment action raising a question as to the constitutionality of a provision of the Act, which the district court is required to certify to the *en banc* court of appeals. The *en banc* court's decision is reviewable by direct appeal to this Court.[13] This Court has held that section 437h does not "require certification of constitutional claims that are frivolous." *California Medical Association* v. *FEC*, 453 U.S. 182, 193-94 n.14 (1981). *Accord*, *Mott* v. *FEC*, 494 F. Supp. 131, 134 (D.D.C. 1980) (section 437h applies only to "serious" constitutional questions), *aff'd mem. sub nom. National Conservative Political Action Committee* v. *FEC*, 672 F.2d 896 (D.C. Cir. 1981).[14]

Of the several pages of constitutional issues listed by Hopfmann in his Questions Presented (Pet. QP-12-16), only a few are even supported by argument (Pet. 55-60) as required by Sup. Ct. R. 21.5. First, Hopfmann argues (Pet. 56) that the Commission's enforcement and advisory opinion authority, 2 U.S.C.

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[13] Former section 437h(c) further provided for expedited hearing in the court of appeals and in this Court. While petitioner's case was on appeal, however, Congress repealed subsection (c). Pub. L. 98-620, § 402(1)(B), 98 Stat. 3335, 3357 (1984).

[14] Contrary to petitioner's assertions (Pet. 5 n.1, 27-28, 50-55), this Court's conclusion in *California Medical* is not inconsistent with section 437h's requirement that "all questions of constitutionality" be certified, for constitutional claims that are settled or frivolous are "essentially fictitious," *Bailey* v. *Patterson*, 369 U.S. 31, 33 (1962), and thus not actual constitutional "questions" at all.

§§ 437f, 437g, are "assertion[s] of judicial power," and violate the "case or controversy" requirement of Article III. However, it has long been settled that Congress can require that the initial determination with respect to congressionally created rights and obligations be made by non-Article III tribunals, *Crowell* v. *Benson*, 285 U.S. 22, 54 (1932); *Gibas* v. *Saginaw Mining Company*, 748 F.2d 1112, 1119 (6th Cir. 1984), *cert. denied*, 105 S. Ct. 2357 (1985), and the Article III "case or controversy" requirement by its terms applies only to the federal courts and not to administrative agencies created by Congress under Article I. *See Tennessee Gas Pipeline Co.* v. *Federal Power Commission*, 606 F.2d 1373, 1380 (D.C. Cir. 1979). Furthermore, the courts have approved the use of advisory opinions as a valuable mechanism to reduce uncertainty in the law's application. *See CSC* v. *Letter Carriers*, 413 U.S. 548, 580 (1973); *Martin Tractor Co.* v. *FEC*, 627 F.2d 375, 384-86, 388-90 (D.C. Cir.), *cert. denied*, 449 U.S. 954 (1980).[15]

Petitioner's contention (Pet. 56) that the Commission has violated Article I, Sec. 5, cl. 1 by improperly judging the elections and qualifications of Congress's members is absurd. As discussed *supra*, pp. 10-11, the Commission has never purported to decide how elections are to be conducted in Massachusetts; it has only recognized how Massachusetts itself has chosen to conduct them. Finally, Hopfmann contends (Pet. 57, 59-60) that the Secretary of the Senate's designee,

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[15] Hopfmann's reliance (Pet. 57, n.12) upon individual statements in the legislative history opposing granting the Commission the power to issue advisory opinions "warrant[s] little comment in light of Congress' failure to heed them. . . ." *Action For Children's Television* v. *FCC*, 564 F.2d 458, 477 n.30 (D.C. Cir. 1977).

a non-voting *ex officio* member of the Commission (*see* 2 U.S.C. § 437c(a)(1)), should have been precluded from participation in this case because of a conflict of interest when the respondent is an incumbent senator. However, even if it had merit, Hopfmann waived the right to raise this issue in court by failing to present it to the Commission. *See, e.g.*, *Gibson* v. *FTC*, 682 F.2d 554, 563-66 (5th Cir. 1982), *cert. denied*, 460 U.S. 1068 (1983) (citing cases).

In sum, Petitioner's strenuous objections to the Massachusetts party rule and his omission from the primary ballot are not relevant to this case, and the rest of his contentions are muddled, settled, or plainly wrong.[16] Thus, as the judges of the courts below unanimously concluded, Mr. Hopfmann's constitutional arguments are too frivolous to warrant the attention of this Court.

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[16] Petitioner's complaint (Pet. 31-33) about the court of appeal's conclusion (Pet. App. C-7-9) that his appeal could have been dismissed for failure to obey court orders is not properly before the Court, since the court of appeals did not rest on this determination but proceeded to adjudicate the appeal on its merits, *see* p. 5, *supra*. We note, however, that Mr. Hopfmann's claim of unequal treatment is based upon a mischaracterization of the court of appeals' order regarding the filing of the appendix (Pet. App. J-2) and that, unlike Mr. Hopfmann, the Commission filed a proper motion whenever it needed additional time.

CONCLUSION

For the reasons stated above, the Commission requests that the petition for a writ of *certiorari* be denied.

Respectfully submitted,

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NOVEMBER 15, 1985

APPENDIX

APPENDIX

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 82-3667

ALWIN E. HOPFMANN, PLAINTIFF

v.

FEDERAL ELECTION COMMISSION, ET AL., DEFENDANTS

[Filed Mar. 8. 1984]

MEMORANDUM OPINION

Plaintiff Alwin E. Hopfmann seeks review of the Federal Election Commission's ("Commission" or "FEC") dismissal of his administrative complaint alleging that Senator Edward Kennedy and the Committee to Re-Elect Senator Kennedy ("Committee") violated provisions of the Federal Election Campaign Act ("FECA" or "Act") relating to reporting requirements and contribution limitations. 2 U.S.C. §§ 434(a), (b), and 441a(f). Plaintiff's request for review presents two issues: whether the FEC decision is "contrary to law"; whether plaintiff's constitutional challenges merit certification to the United States Court of Appeals.[1] For the following reasons,

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[1] The two relevant provisions of the statute are discussed *infra* at pages 5 and 7.

this Court affirms the FEC decision, finding that it was proper and correct, and declines to certify plaintiff's constitutional challenges to the United States Court of Appeals.

Plaintiff Hopfmann was a participant in the Massachusetts Democratic Party's pre-primary convention held in May 1982. Among its purposes, the convention was to endorse those candidates who received at least 15% of the votes from party delegates. Under Massachusetts law, only those candidates with 15% support from their party can be placed on the ballot for the primary election. Mass. Gen. Laws Ann., ch. 53, § 44 (West 1975). The incumbent Senator Kennedy was the sole candidate to receive 15% of the convention votes, consequently, only his name was placed on the ballot for the September 1982 primary election.

Plaintiff filed a complaint with the Federal Election Commission in September 1982, asserting that the earlier convention of May satisfied the criteria of an "election" as defined in the Act, and therefore Senator Kennedy and the Committee violated certain reporting requirements of the Act pertaining to elections. Section 431(1)(B) of the Act defines "election" as follows:

> The term "election" means . . . a convention or caucus of a political party which has authority to *nominate* a candidate.

(emphasis added). Plaintiff claimed that since the convention vote resulted in the exclusive endorsement of Senator Kennedy (and consequently only his name appeared on the September primary election ballot), the convention in fact had authority to nominate a candidate and thus was an "election" under the Act.

On October 25, 1982 the Commission by letter dismissed the plaintiff's complaint on the basis of the "Expedited First General Counsel's Report" ("Report") of October 22, 1982.[2] The General Counsel explained:

> Because the convention is merely a "winnowing-out" process and does not under any circumstances result in the nomination of a candidate until after the primary election is held, the convention should not be considered as an election for purposes of the Federal Election Campaign Act of 1971, as amended.

Report at 6 (attachment to plaintiff's complaint). He further noted that Massachusetts law provides for write-in campaigns, Mass. Gen. Laws Ann., ch. 53, § 3 (West 1975), so that the election process does not terminate with the vote of the party's convention delegates. The Commission found no reason to believe that Senator Kennedy or the Committee violated any of the reporting provisions of the Act.

Plaintiff then brought this action under section 437g(a)(8)(A) seeking judicial review of the dismissal of his complaint. Later, in an amended complaint, plaintiff sought certification of his constitutional challenges under section 437h.

Numerous motions have been filed by both parties in this case,[3] and the plaintiff has chosen an unusual

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[2] Although the Commission did not expressly adopt the General Counsel's Report in announcing its decision, the Report is viewed as the record upon which the Commission based its decision. *See* Federal Election Commission v. Democratic Senatorial Campaign Committee, 454 U.S. 27, 38-39 n.19 (1981).

[3] The FEC moved to dismiss for lack of jurisdiction, insufficiency of process and failure to prosecute. The Court denies

series of motions to advance his complaint against the FEC.[4] In this opinion the Court addresses defendant's motion for summary judgment regarding the FEC decision, and defendant's motion to dismiss plaintiff's constitutional challenges.

A.

First, this Court considers plaintiff's challenge to the dismissal of his complaint. The standard of review is explained in section 437g(a)(8)(C):

> (T)he court may declare that dismissal of the complaint . . . is contrary to law, and may direct the Commission to conform with such declaration within 30 days, failing which the complainant may bring . . . a civil action to remedy the violation involved in the original complaint.

To find that the Commission acted contrary to law, it must be shown that its decision was arbitrary or

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this motion finding that the complaint was timely filed, and that defendant has failed to show that the relatively brief delay in service of process would justify dismissal. *See*, e.g., Prudential Lines, Inc. v. Marine Repair Services, Inc., 94 F.R.D. 325 (E.D.N.Y. 1982).

[4] A number of plaintiff's motions are not germane to the central issues, nor are they based on any coherent legal theory. For example, plaintiff's motion of May 31, 1983 for "Continuance Until Discovery Can be Completed" is completely inappropriate because this Court's review under section 437g is based on the record before the Commission at the time it made its decision. Discovery is likewise inappropriate to determine the merits of plaintiff's constitutional challenges.

Plaintiff's motion of July 26, 1983, requesting leave to add certain additional parties, and of July 29, 1983, requesting clarification of what constitutes the "pleadings" under the statute, also lack merit.

capricious, or an abuse of discretion. In *Federal Election Commission* v. *Democratic Senatorial Campaign Commission*, 454 U.S. 27, 39 (1981), the Supreme Court noted that the scope of review was limited and that the task of the reviewing court "is not to interpret the statute as it thought best but rather the narrower inquiry into whether the Commission's construction was 'sufficiently reasonable' to be accepted by a reviewing court."

When the Commission reached its decision of October 25, 1982, it had the Report of its General Counsel which addressed the issue of whether the Democratic pre-primary convention satisfied the criteria of an "election" as defined in the Act. The Report contained an analysis of the charter of the Democratic Party of Massachusetts and relevant Massachusetts state laws. Additionally, the Report contained references to an Advisory Opinion from the Supreme Judicial Court of Massachusetts regarding a proposed change in Massachusetts state law governing the election process and earlier FEC advisory opinions. The General Counsel concluded that the crucial distinction between the "endorsement" process of the Massachusetts Democratic convention, and the "nomination" process of other state conventions found to be elections under the Act, was the fact that the former allowed for write-in campaigns at the primary elections. The General Counsel explained:

> The primary election contest in Massachusetts does not in any circumstances terminate with the vote of the party's convention delegates. Massachusetts still holds a primary election. Certification that a candidate is his or her party's nominee must await the results of the primary contest. The contest is not a hollow proce-

> dure because the Massachusetts General Laws provide for write-in campaigns.

Report at 5. He further explained that although Senator Kennedy was the only candidate to receive the convention's endorsement for the primary election, "until the voters spoke at the polls in September, there was no Democratic Party nominee for the U.S. Senate from Massachusetts." *Id.* at 6. Thus, because the convention did not satisfy the criteria of an "election" under the Act, the General Counsel concluded that Senator Kennedy and the Committee had not violated the Act's reporting requirements.

This Court finds that the decision of the FEC dismissing plaintiff's complaint was reasonable in light of the General Counsel's Report. Furthermore, the plaintiff's arguments challenging the Commission's decision are without merit. Plaintiff asserts that the FEC has given no reason for its decision, but that is not true. The General Counsel's Report adequately sets out the reasons upon which the FEC's decision is based. Furthermore, it is apparent that plaintiff's contentions were considered, and that the FEC's decision is consistent with its previous decisions. For the foregoing reasons, this Court finds that the FEC's decision was "sufficiently reasonable" to merit this Court's deference.

B.

The plaintiff's request for certification of his constitutional challenges is brought under section 437h of the Act which provides:

> (A)ny individual eligible to vote in any election for the office of President . . . may institute such actions in the appropriate [federal] district court . . . , including actions for declaratory judgment, as may be appropriate to construe the

> constitutionality of any provision of the Act. The district court immediately shall certify all questions of constitutionality . . . to the court of appeals for the [federal] circuit involved.

Plaintiff argues that this provision requires the Court to certify his constitutional challenges to the United States Court of Appeals without regard to the merit of his claims. However, in *California Medical Ass'n* v. *Federal Election Commission*, 453 U.S. 182, 193-194 n.14 (1981), the Supreme Court plainly stated, "(W)e do not construe § 437h to require certification of constitutional claims that are frivolous . . ." (citing *Gifford* v. *Congress*, 452 F. Supp. 802 (E.D. Ca. 1978)). Furthermore, in *Mott* v. *Federal Election Commission*, 494 F. Supp. 131, 134 (D.D.C. 1980), the court found that review of a complaint to determine whether it presents a ripe and substantial constitutional controversy is appropriate before certifying questions pursuant to section 437h.

After careful consideration, this Court concludes that plaintiff's challenges do not raise substantial constitutional questions, are frivolous and are not based on any coherent legal theory. He asserts a wide range of challenges to the Act: (1) that it violates Article I of the Constitution and the Seventeenth Amendment by regulating the times, places, and manner of holding elections for United States senators; (2) abridges plaintiff's rights to due process by not affording him a full hearing before the FEC; (3) denies plaintiff equal protection of the laws by protecting the incumbent politician; (4) violates the "case or controversy" requirement of the Constitution by allowing the Commission to rely on earlier FEC advisory opinions in its decisionmaking process; (5) violates the First Amendment because the Act

prevents an individual who is a losing candidate in a political election from petitioning for redress in the courts; (6) violates the Seventh Amendment by denying plaintiff a jury trial on his complaint.

Plaintiff's allegations that the FEC has violated Article I of the Constitution and the Seventeenth Amendment are groundless. The fact is that the state of Massachusetts determines the time, place and manner of its elections, not the FEC. Plaintiff has thus failed in his attempt to convince this Court that the FEC has violated the doctrine of separation of powers or the Seventeenth Amendment by finding that the Massachusetts Democratic Convention was not an "election" under the Act. Similarly, plaintiff's due process challenge must fall because he claims the right to an adversarial proceeding when in fact the FEC proceedings do not determine an individual's legal rights. *See Hannah* v. *Larche*, 363 U.S. 420, 441-42 (1980). Also, plaintiff's arguments alleging that he has been denied equal protection of the laws is without merit. Beyond a bare assertion, he provides no factual basis for his allegations that the FEC's decision was intended to "protect the incumbent." Furthermore, this type of equal protection claim previously has been rejected by the Supreme Court. *See Buckley* v. *Valeo*, 424 U.S. 1, 96 (1976).

His complaint about the FEC's use of advisory opinions is meritless and overlooks the fact that the United States Court of Appeals for the District of Columbia has approved the use of such opinions insomuch as they contribute to consistency in the administrative process. *See Martin Tractor Co.* v. *Federal Election Commission*, 627 F.2d 375, 384 (D.C. Cir. 1980), *cert. denied sub. nom. National*

Chamber Alliance for Politics v. *Federal Election Commission*, 449 U.S. 954 (1980). Likewise, plaintiff's First Amendment claim is frivolous because the FECA provides for judicial review under section 437g(a)(8)(C), and for certification of constitutional claims under section 437h, to facilitate access to the courts, not to prevent it. Finally, plaintiff's claim under the Seventh Amendment is without merit under *Lehman* v. *Nakshian*, 453 U.S. 156 (1981). There the Supreme Court stated that a "plaintiff in an action against the United States has a right to trial by jury *only* where Congress has affirmatively and unambiguously granted that right by statute." *Id.* at 168 (emphasis added). The FECA does not provide for jury trials and thus the plaintiff's Seventh Amendment challenge must fall.

CONCLUSION

For the reasons set out above the plaintiff's request for review and judicial relief by this Court are denied. An appropriate order dismissing the complaint will be entered.

March 8, 1984

/s/ Barrington D. Parker
BARRINGTON D. PARKER
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 82-3667

ALWIN E. HOPFMANN, PLAINTIFF

v.

FEDERAL ELECTION COMMISSION, ET AL., DEFENDANTS

[Filed Mar. 8, 1984]

ORDER

The Court having fully considered defendant Federal Election Commission's Motion to Dismiss and for Summary Judgment, it is this 8th day of March, 1984

ORDERED

That the Motion to Dismiss is granted as to the plaintiff's constitutional claims and those claims are dismissed with prejudice.

That summary judgment is granted to the defendant Federal Election Commission as to the plaintiff's administrative claims, and judgment is entered in favor of the defendant.

That the complaint of the plaintiff is dismissed with prejudice.

/s/ Barrington D. Parker
BARRINGTON D. PARKER
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1984

CA No. 82-03667

No. 84-5207

ALWIN E. HOPFMANN

v.

UNITED STATES FEDERAL
ELECTION COMMISSION, ET AL.

[Filed July 19, 1985]

Before: Edwards, Scalia and Starr, Circuit Judges

ORDER

Upon consideration of the petition for rehearing of appellant Alwin E. Hopfmann, it is

ORDERED, by the Court, that the petition is denied.

Per Curiam

FOR THE COURT
GEORGE A. FISHER
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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CA No. 82-03667

No. 84-5207

ALWIN E. HOPFMANN

v.

UNITED STATES FEDERAL
ELECTION COMMISSION, ET AL.

[Filed July 19, 1985]

Before: Robinson, Chief Judge; Wright, Tamm, Wald, Mikva, Edwards, Ginsburg, Bork, Scalia and Starr, Circuit Judges

ORDER

The suggestion for rehearing *en banc* of appellant Alwin E. Hopfmann has been circulated to the full Court and no member has requested the taking of a vote thereon. Upon consideration of the foregoing, it is

ORDERED, by the Court *en banc*, that the suggestion is denied.

Per Curiam
FOR THE COURT
GEORGE A. FISHER
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

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